Supreme Court, U.S.
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No. 09-955

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In The

Supreme Court of the United States

RICHARD LAWRENCE ALEXIS,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's convictions under state law for simple drug possession, though considered individually as federal law misdemeanors, collectively qualify as a "state counterpart" recidivist conviction that mirrors federal recidivist possession under the Controlled Substances Act, 21 U.S.C. §§ 844 and 851, and should therefore be treated as a conviction for an "aggravated felony" on the theory that Petitioner could have been prosecuted for recidivist simple possession, which is a federal law felony, despite the fact that there were no charges or findings of a prior conviction in his prosecution for subsequent possessions before the state court.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no non-governmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, denying Petitioner's petition for review, is unreported. *Alexis v. Holder,* No. 08-60745 (5th Cir. November 13, 2009). App. 1-3, *infra.*

The decision of the Board of Immigration Appeals, affirming the decision of the Immigration Judge, is unreported. *In re Alexis,* File A43 155 894 (BIA, July 25, 2008). App. 4-8, *infra.*

The decision of the Immigration Judge, denying Petitioner an opportunity to apply for cancellation of removal, is unreported. *In re Alexis,* File A43 155 894 (United States Immigration Court, Houston, Texas, March 27, 2008). App. 9-17, *infra.*

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on November 13, 2009. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. § 1254(1). While Petitioner's case involves an application for relief from removal, review is not barred by 8 U.S.C. § 1252(a)(2)(B) because the question presented herein is a "question of law raised upon a petition for review." 8 U.S.C. § 1252(a)(2)(D).

STATUTORY PROVISIONS

8 U.S.C. § 1101(a)(43)(B) provides that the term "aggravated felony" means: "Illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)."

8 U.S.C. § 1229b(a) provides that: "The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien – (1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony."

18 U.S.C. § 924(c)(2) provides that: "For purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46."

21 U.S.C. § 844 is reproduced in the appendix. App. 18-20, *infra*.

21 U.S.C. § 851 is reproduced in the appendix. App. 20-24, *infra*.

STATEMENT OF THE CASE

The question presented for review in this case is identical to the question raised in *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 265 (5th Cir. 2009), *cert. granted*, 2009 U.S. LEXIS 9024 (U.S. Dec. 14, 2009) (09-60). Specifically, the court of appeals' decision in this case squarely raises an issue on which there is an acknowledged conflict among its sister circuits: whether Petitioner's convictions under state law for simple drug possession, though considered individually as federal law misdemeanors, collectively qualify as a "state counterpart" recidivist conviction that mirrors federal recidivist possession under the Controlled Substances Act and should therefore be treated as a conviction for an "aggravated felony" on the theory that Petitioner could have been prosecuted for recidivist simple possession, which is a federal law felony, despite the fact that there were no charges or findings of a prior conviction in his prosecution for subsequent possessions before the state court.

Two courts of appeals, including the court of appeals below, have held that an alien has been "convicted" of an "aggravated felony" in this situation. Four courts of appeals have reached the opposite conclusion. The Board of Immigration Appeals (BIA) agrees with the latter courts that an alien convicted of simple possession cannot be considered "convicted" of an "aggravated felony" on the theory that he **could have been** prosecuted as a recidivist possessor, if there in fact was no prosecution as a recidivist and hence no finding by a judge or jury of any valid prior

conviction. The issue is a recurring and important one, as the BIA has recognized, because an alien deemed "convicted" of an "aggravated felony" upon a conviction for simple drug possession faces mandatory removal from the country. This Court's review is therefore warranted.

A. Jurisdiction of the Court of Appeals

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA § 242(a)(1) and 8 U.S.C. § 1252(a)(1) which provide for judicial review of a final order of removal.

B. Facts

The Petitioner, Mr. Alexis, is a 27-year-old male. He is a native and citizen of Trinidad and Tobago. App. 9-17, *infra*. On July 16, 1991, he was admitted into the United States as a Legal Permanent Resident. *Id.* The Notice to Appear at the Immigration Court charged Petitioner as being subject to removal as an alien convicted of a controlled substance violation under § 237(a)(2)(B)(1), and as an alien convicted of an aggravated felony under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA or "The Act"). *Id.* On January 7, 2008, Petitioner denied both charges against him and requested termination of his proceedings. *Id.* In the alternative, he requested the opportunity to submit an application for Cancellation of Removal under

INA § 240A(a), which he subsequently filed with the Immigration Court. *Id.*

Petitioner's criminal history, which resulted in the initiation of removal proceedings against him, began on May 14, 2002. On that day, the Petitioner was convicted of the misdemeanor offense of possession of marihuana, less than two ounces. Subsequently, on June 10, 2005, Petitioner was convicted of the misdemeanor offense of possession of marihuana, less than two ounces. Finally, on July 31, 2007, Petitioner was convicted of having a prohibited substance in a correctional facility. However, this final conviction played no part in the Immigration Judge's decision to order Petitioner removed. To wit, "the fact that [Petitioner] was convicted in 2007 of possession of a substance identified as Clonozapam is superfluous as it relates to whether or not the [Petitioner] was convicted of more than one controlled substance violation." App. 9-13, *infra.*

On March 27, 2008, the Immigration Judge ("IJ") found that Petitioner was a recidivist and, as such, an aggravated felon. *Id.* The IJ also sustained both charges against the Petitioner and pretermitted his application for Cancellation of Removal under INA § 240A(a), finding him ineligible for that form of relief based on the sustained aggravated felony charge. *Id.*

Petitioner appealed the erroneous decision to the Board of Immigration Appeals ("BIA"). At the BIA level, Petitioner argued that despite his multiple drug convictions, he is not and should not be considered an

aggravated felon under § 101(a)(43)(B) of the Act. App. 4-8, *infra*. To this end, Petitioner showed that neither of his convictions is a felony under the Controlled Substances Act. Secondly, Petitioner showed that his subsequent possession conviction did not qualify as a "state counterpart" recidivist conviction to the federal recidivist possession under the Controlled Substances Act and was, therefore, neither a drug trafficking crime nor an aggravated felony. The BIA, however, erroneously upheld the IJ's denial of Petitioner's claims, maintaining that their decision in *In re Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007) was controlling. *Id.*

Alternatively, the BIA cited *U.S. v. Sanchez-Villalobos*, 412 F.3d 572, 576-77 (5th Cir. 2005), as authority for the conclusion that an alien convicted under Texas law of simple possession of a controlled substance, based on an offense committed after a prior Texas drug conviction became final, stood convicted of an aggravated felony in the Fifth Circuit. *Id.* As discussed below, reliance on these decisions is misplaced given the facts of the instant case, especially in the wake of the Supreme Court's decision in *Lopez v. Gonzales*, 127 S.Ct. 625, 633 (2006), discussed *infra*. Additionally, the BIA cited *Smith v. Gonzales*, 468 F.3d 272 (5th Cir. 2006), to emphasize the point that the Petitioner's conviction of 2002 was indeed a final conviction, though this point is not in controversy. *Id.*

Petitioner subsequently timely filed a petition for review with the Fifth Circuit Court of Appeals.

Petitioner, while acknowledging that *U.S. v. Sanchez-Villalobos* is still controlling in the Fifth Circuit, urged the Circuit Court to re-examine that decision in light of the Supreme Court's ruling in *Lopez, supra.* Petitioner also highlighted in his petition that the BIA itself has found that recidivist possession cases should be governed by the Supreme Court as opposed to Circuit law. *In re Carachuri-Rosendo*, 24 I&N Dec. 382, 388 (BIA 2007). As a result, Petitioner was merely seeking an application of the Supreme Court's decision to his case. Unfortunately, while Petitioner's case was pending before the Fifth Circuit, the Circuit Court issued a decision in *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 265 (5th Cir. 2009), *cert. granted*, 2009 U.S. LEXIS 9024 (U.S. Dec. 14, 2009) (09-60), where the Fifth Circuit rejected the very arguments raised by Petitioner. As a result, petition for review in the instant case was also denied. App. 1-3, *infra*. It should be noted that despite the Fifth Circuit's ruling against the Petitioner on the basis of the decision in *In re Carachuri*, *supra*, the court itself acknowledged in that decision the existence of a "circuit split" on whether an alien qualifies as an aggravated felon in the circumstances of this case, with the "Seventh Circuit agree[ing] with this court's approach" and the "First, Second, Third, and Sixth Circuits hav[ing] adopted the approach the BIA advocated in its *en banc* opinion in this case." *Id.* It is in light of the two-to-four Circuit split that Petitioner timely files the instant petition for writ of certiorari.

ARGUMENT FOR ALLOWING THE WRIT

There is a mature and acknowledged conflict among the courts of appeals on this important matter; specifically, on whether an alien convicted of simple drug possessions, that if considered individually are federal law misdemeanors, can be deemed "convicted" of an "aggravated felony" on the theory that an alien could have been prosecuted as a recidivist, even if he in fact was not prosecuted as a recidivist and no court or jury has made such a finding in connection with his conviction. Not only have six courts of appeals resolved the issue, but the BIA has established that its approach will govern in removal proceedings in any circuit yet to issue a controlling decision. The issue is a recurring and important one for the many aliens subject to mandatory removal under the approach of the court of appeals below, and this case presents a highly suitable vehicle for resolving the conflict. In addition, the court of appeals' decision cannot be squared with the plain terms of the governing statutes. This Court therefore should grant review as it did on the exact same issue in *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 265 (5th Cir. 2009), *cert. granted*, 2009 U.S. LEXIS 9024 (U.S. Dec. 14, 2009) (09-60).

A. There Is a Clear Conflict Among United States Courts of Appeals on the Issue Presented for Review

The Fifth Circuit, in its decision in *Carachuri-Rosendo v. Holder*, *supra*, acknowledged that a circuit

split exists on the question presented. In turn, the BIA itself agrees that the facts of the instant case do not warrant a finding of an aggravated felony, except in the Second Circuit, Seventh Circuit, and in the Fifth Circuit after *Sanchez-Villalobos*. *See In re Thomas*, 24 I&N Dec. 414, 416 (BIA 2007). The split in the circuit courts is profound. In the First Circuit, a noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. *Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006). In the Second Circuit, a second or subsequent state possession conviction may be deemed an aggravated felony regardless of whether the state prosecuted the individual as a recidivist. *U.S. v. Simpson*, 319 F.3d 81, 85-86 (2nd Cir. 2002). However, it can be argued that the Second Circuit is actually undecided. In *Simpson*, they offered no comment on whether convictions constitute aggravated felony beyond criminal sentencing guidelines. *Id.* at 86 n.7. In the Third Circuit, a noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. *Steel v. Blackman*, 236 F.3d 130, 137-38 (3rd Cir. 2001). In the Fourth Circuit, a noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist.

In re Carachuri-Rosendo, 24 I&N Dec. 382 (BIA 2007); *In re Thomas*, 24 I&N Dec. 414 (BIA 2007). In the Fifth Circuit, a second or subsequent state possession conviction may be deemed an aggravated felony regardless of whether the state prosecuted the individual as a recidivist. *U.S. v. Sanchez-Villalobos*, 412 F.3d 572, 576-77 (5th Cir. 2005); *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 265 (5th Cir. 2009), *cert. granted*, 2009 U.S. LEXIS 9024 (U.S. Dec. 14, 2009) (09-60). In the Sixth Circuit, a noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. *U.S. v. Palacios-Suarez*, 418 F.3d 692, 699-700 (6th Cir. 2005). *See also Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008). In the Seventh Circuit, a second or subsequent state possession conviction may be deemed an aggravated felony regardless of whether the state prosecuted the individual as a recidivist. *U.S. v. Pacheco-Diaz*, 506 F.3d 545-49 (7th Cir. 2007). In the Eighth Circuit, a noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. *In re Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007); *In re Thomas*, 24 I&N Dec. 414 (BIA 2007). In the Ninth Circuit, a noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist.

Ferreira v. Ashcroft, 382 F.3d 1045, 1050 (9th Cir. 2004). In the Tenth Circuit, a noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. *In re Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007); *In re Thomas*, 24 I&N Dec. 414 (BIA 2007). In the Eleventh Circuit, a noncitizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. *In re Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007); *In re Thomas*, 24 I&N Dec. 414 (BIA 2007).

It should be highlighted that *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008) was the first federal court decision post-*Lopez* to apply *Lopez* to the "recidivist possession" issue in an immigration case. The holding is that an individual's second possession conviction is not converted into a "drug trafficking" aggravated felony where the individual was not charged and convicted of recidivist possession in the criminal proceedings. *See id.* As *Rashid* explains, the Supreme Court's reading of the statutory provisions in *Lopez* does not permit a court to consider how an offense **could have been** treated in the federal system. Rather, *Lopez* guides us to the understanding that, under the statutory interpretation of the "drug trafficking" aggravated felony provision, courts must

examine what the actual state offense "proscribes" and whether that is "a felony as defined by the [CSA]" in order to determine if a person has been convicted of a "drug trafficking" aggravated felony. *Lopez*, 127 S.Ct. at 631, 633. As the Sixth Circuit summarizes, the ultimate problem with the conclusion that a court could consider how an offense could have been treated is that they add "a hypothetical to a hypothetical." *Rashid*, 531 F.3d at 445 (6th Cir. 2008). The Sixth Circuit also explains that the Supreme Court itself made a similar observation in the *Lopez* case when it noted that a person convicted of simple possession of a large quantity of drugs under state law could not be labeled as an aggravated felon despite the fact that he could have been charged, hypothetically, with a possession-with-intent-to-distribute felony instead of a simple possession offense. *Id.* Thus, *Lopez* simply does not provide for the type of hypothetical-plus-hypothetical approach that has been applied to Petitioner's case.

The Second Circuit later agreed with the Sixth, holding "that a second conviction for simple drug possession under state law is not a felony under the [CSA] simply because it **could have been** prosecuted as a recidivist offense under 21 U.S.C. § 844(a)." *Alsol v. Mukasey*, 548 F.3d 207, 210 (2d Cir. 2008). Instead, the court explained, if an IJ denies cancellation of removal on the basis of a prior conviction, "the fact of recidivism must be reflected in the conviction the government seeks to classify as an aggravated felony," rather than "merely in [a defendant's] underlying

conduct." *Id.* The 4-2 conflict among the courts of appeals is mature and entrenched. Four courts of appeals have now addressed the issue raised by this case following this Court's decision in *Lopez*, and those four courts are divided 2-2. The competing opinions clearly highlight the arguments on both sides of the issue, and the court of appeals below and the Seventh Circuit have considered and rejected the majority view. This also includes the rejection of the view of the Board of Immigration Appeals expressed in *In re Carachuri-Rosendo, supra*, and *In re Thomas, supra*. This conflict can only be resolved by this honorable Court.

B. The Court of Appeals Erred in Holding that Petitioner Is an Aggravated Felon Since None of his Convictions Are Considered a Felony Under the Controlled Substances Act and, Therefore, Neither Conviction Is an Aggravated Felony.

Under the INA, an aggravated felony includes the "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in 18 U.S.C. § 924(c))." 8 U.S.C. § 1101(a)(43)(B). A drug trafficking crime includes "any felony punishable under the Controlled Substances Act (CSA)." 18 U.S.C. § 924(c)(2). The United States Supreme Court in *Lopez v. Gonzales* held that "a state offense constitutes a felony punishable under the Controlled Substances Act only if it proscribes conduct punishable as

a felony under that federal law." *Lopez*, 127 S.Ct. 625, 633 (2006). Under federal law, an offense punishable by more than one year in prison is considered a felony. 18 U.S.C. § 3559(a). Accordingly, a state drug offense must correspond to an offense that carries a maximum term of imprisonment exceeding 1 year under the CSA to qualify as a "drug trafficking crime" and, by extension, as an aggravated felony. *Lopez*, 127 S.Ct. 625, 631, n.7.

1. Petitioner's conviction for possession of marihuana

Petitioner was first convicted of Misdemeanor Possession of Marihuana under 2 ounces. A state offense whose elements include the elements of a felony punishable under the Controlled Substances Act (CSA) is an aggravated felony. *Lopez*, 127 S.Ct. 625. However, under the CSA, simple possession of marihuana is punishable as a misdemeanor and not a felony. Section 844(a) states that it is "unlawful for any person knowingly or intentionally to possess a controlled substance [and] . . . [a]ny person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year." 21 U.S.C. § 844(a). Therefore, because Petitioner's misdemeanor conviction for possession of marihuana is not punishable by more than a year, the offense does not qualify as a felony, let alone an aggravated felony.

2. Petitioner's second conviction for possession of marihuana

Petitioner was later again convicted under the state law of Misdemeanor Possession of Marihuana, weighing less than 2 ounces. Again, under the Controlled Substances Act, simple possession of marihuana is punishable as a misdemeanor and not a felony. 21 U.S.C. § 844(a). Neither of Petitioner's convictions was a felony under state law. Furthermore, the United States Supreme Court has affirmed the position that even if there was a felony under state law, it is not necessarily a felony under the CSA. In fact, the Supreme Court stated very clearly that a state drug felony will be considered an aggravated felony **only** if it is also a felony under the CSA. *Lopez,* 127 S.Ct. 625, 633. In that case, Lopez was convicted in South Dakota for a state felony offense of aiding and abetting possession of cocaine, which state law treated as the equivalent of possessing the drug. *Id.* at 629. The analogous section under the Controlled Substances Act for Lopez's conviction is § 844(a), which punishes simple possession of a controlled substance as a misdemeanor. 21 U.S.C. § 844(a). The Supreme Court concluded that despite the fact that Lopez's conviction was a felony under state law, because it was a misdemeanor under the federal CSA, it did not qualify as an aggravated felony. *Lopez,* 127 S.Ct. 625, 633. The result is even clearer in the Petitioner's case, where neither of his relevant convictions was a state felony.

C. The Court of Appeals Erred in Holding that Petitioner Is an Aggravated Felon Since his Subsequent Possession Conviction Is Not an Aggravated Felony Because He Was Not Convicted of a Recidivist Offense that Mirrors 21 U.S.C. § 844(a) and Fulfills the Requirements of 21 U.S.C. § 851.

Although *U.S. v. Sanchez-Villalobos* is still controlling in the Fifth Circuit, and was upheld in *Carachuri-Rosendo v. Holder,* these cases require reexamination in light of *Lopez, supra.* The BIA itself has found that recidivist possession cases should be governed by the Supreme Court as opposed to Circuit law. *In re Carachuri-Rosendo*, 24 I&N Dec. at 388. The Petitioner in the instant case merely requests an application of the Supreme Court's decision to his case. The relevant section in the Controlled Substances Act regarding recidivist possession provides, in part, that any person who violates 21 U.S.C. § 844(a) after "a prior conviction under § 844(a) . . . or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final . . . shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years." 21 U.S.C. § 844(a). Although Petitioner's second state conviction for simple possession occurred after a prior conviction, Petitioner is not a recidivist under § 844(a). The question, as the BIA pointed out, is not whether the person's individual circumstances make him the type of person who could have been prosecuted as a federal felon, but rather whether he has a state "conviction" for an offense that "proscribes

conduct punishable as a felony under" federal law. *Lopez,* 127 S.Ct. 633. While *Lopez* went far in explaining the meaning of the statutory language in § 844(a), significant ambiguities persist in the "recidivist possession" context. *In re Carachuri-Rosendo*, 24 I&N Dec. at 388. The BIA outlined the complexities with regard to recidivist possession, and they emphasized that this was not a discrete offense under federal law. *Id.* To illustrate, recidivist possession is not defined in relation to "elements", which is how criminal offenses are defined. *Schmuck v. United States,* 489 U.S. 705, 716-17 (1989); *In re Winship*, 397 U.S. 358, 364 (1970). Instead, it is an amalgam of elements, substantive sentencing factors, and procedural safeguards, many of which need never have been submitted to a jury. *In re Winship* at 389. Specifically, although 21 U.S.C. § 844(a) defines simple possession by reference to several formal statutory elements, facts leading to recidivist felony *punishment*, such as the existence of a prior conviction, do not qualify as "elements" in the traditional sense. *Almendarez-Torres v. United States*, 523 U.S. 224, 228-35 (1999) (emphasis added). Furthermore, 21 U.S.C. § 851 precludes a federal judge from enhancing a drug offender's sentence on the basis of recidivism absent compliance with a number of safeguards that, among other things, serve to protect the right of the accused to notice and an opportunity to be heard with regard to the appropriateness of an increased punishment based on prior convictions. *In re Carachuri-Rosendo*, 24 I&N Dec. at 389.

1. Immigration courts must focus on the offense actually charged in state court to determine whether the offense is punishable as a federal felony.

An additional issue affecting the interpretation of 21 U.S.C. § 844(a) arises from the fact that determinations respecting "drug trafficking crime" convictions are subject to the "categorical approach." *See, e.g., Sandoval-Lua v. Gonzales,* 499 F.3d 1121, 1127-28 (9th Cir. 2007); *Batrez-Gradiz v. Gonzales,* 490 F.3d 1206, 1210-11 (10th Cir. 2007). The Supreme Court in *Lopez* used a categorical approach in determining whether a state offense constitutes an aggravated felony under federal law. *See Lopez*, 127 S.Ct. at 633 ("In sum, we hold that a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under federal law."); *Lopez-Elias v. Reno,* 209 F.3d 788, 791 (5th Cir. 2000). *Cf. Taylor v. United States,* 495 U.S. 575, 599-602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990); *U.S. v. Chapa-Garza,* 243 F.3d 921, 924 (5th Cir. 2001) (looking to the statutory definition of a felony DWI to determine whether it was a "crime of violence" within the meaning of 18 U.S.C. § 16(b)). The categorical approach looks solely to the facts of the conviction and the statutory definition of the predicate offense, rather than to the particular underlying facts. *Taylor*, 495 U.S. at 576. The United States Supreme Court has made it clear that the **only** relevant consideration in the categorical analysis is the offense **actually charged**

in state court, not the hypothetical crime which could have been charged for the defendant's underlying conduct. *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 381 (2004); *U.S. v. Chapa-Garza,* 243 F.3d 921, 924 (5th Cir. 2001). Any alternative approach would be impossible to apply consistently, and thus, would be in danger of trampling the due process requirements of the United States Constitution.

Since "recidivist possession" consists in large part of "non-element" facts, it is unclear on how the categorical approach should be applied in these cases. *In re Carachuri-Rosendo*, 24 I&N Dec. at 389; *see, e.g., Shepard v. United States,* 544 U.S. 13, 19 (2005) (stating that "the categorical approach . . . refers to predicate offenses in terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes"). What is clear, however, is that the purely "hypothetical" approach (looking solely to whether Petitioner could have hypothetically been convicted of a recidivist possession offense under federal law) discounts the importance of the Petitioner's actual offense in favor of an expansive and non-categorical inquiry into the Petitioner's larger criminal record. *In re Carachuri-Rosendo*, 24 I&N Dec. at 393.

In essence, the hypothetical approach would authorize Immigration Judges to collect a series of disjunctive facts about the Petitioner's criminal history, bundle them together for the first time in removal proceedings, and then declare the resulting package to be "an offense" that could have been

prosecuted as a federal felony. This is clearly not the course of action that this honorable Court ever intended to follow. This interpretation is quite plainly in contradiction to the categorical approach mandated by the Supreme Court in order to determine whether an offense constitutes an aggravated felony. *Taylor*, 495 U.S. 575. Therefore, the categorical approach should be applied to hypothetical recidivist possession cases in order to determine whether the offense constitutes an aggravated felony. Since the categorical approach rejects any hypothetical crime based on Petitioner's underlying conduct, Immigration Courts should solely look at Petitioner's conviction of simple misdemeanor possession when determining whether the conviction is an aggravated felony.

2. A state possession conviction does not correspond to a federal recidivist possession felony where the state conviction does not meet the requirements of 21 U.S.C. §§ 844(a) and 851.

In *Lopez v. Gonzales*, the Supreme Court explained that the language of § 101(a)(43)(B) of the Act and 18 U.S.C. § 924(c)(2) applies primarily to offenses that involve "trafficking" in controlled substances. *Lopez*, 127 S.Ct. 630. As the Supreme Court emphasized, construing "trafficking" to encompass simple possession is "incoheren[t] with any commonsense conception" of the term's ordinary meaning and is to be resisted in the absence of a clear congressional directive to the contrary. *Id.* at 629-30.

While the Supreme Court acknowledged in a footnote that "Congress did counter-intuitively define some simple possession offenses as 'illicit trafficking'" by classifying them as "felonies" under the CSA, it described the inclusion of such offenses as "coerced." *Id.* at 630 n.6. The BIA has reasonably discerned from this footnote that 21 U.S.C. § 844(a) defines "recidivist possession" as "an offense" constituting a "felony violation" of the federal drug laws, that "corresponds" to some "state possession crimes." *Id.*; *In re Carachuri-Rosendo*, 24 I&N Dec. 382. The most important lessons of *Lopez,* then, are the concern for actual drug trafficking embodied in § 101(a)(43)(B) of the Act, and the Court's specific holding that a state offense can be an aggravated felony drug trafficking crime "only if it proscribes conduct punishable as a felony under" federal law. *Lopez*, 127 S.Ct. at 633. Because of these dictates, the BIA found it inappropriate to treat a series of misdemeanor possession offenses as "trafficking" felonies unless the state offense corresponds in a meaningful way to the essential requirements that must be met before a felony sentence can be imposed under federal law on the basis of recidivism. *Id.* Therefore, the Petitioner in the instant case merely requests this honorable Court to impose consistency upon the jurisprudence of the Circuit Courts, BIA and the IJ, in light of Supreme Court precedent.

Furthermore, a judge may not impose a felony sentence as a recidivist unless the prosecutor

complies with strict procedural requirements. *In re Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007); *Oyler v. Boles*, 368 U.S. 448, 452-53 (1962). Pursuant to the statute, a prosecutor must file and serve enhancement information that provides the defendant with notice and an opportunity to review the allegations of the prior convictions for accuracy, to contest the use of these convictions, and to create a trial strategy. *Id.* Compliance with the procedural safeguards found in § 851 is vital in determining the length of sentences for which defendants with multiple prior convictions are punishable. *U.S. v. LaBonte*, 520 U.S. 751, 754 (1997); *Price v. U.S.*, 537 U.S. 1152 (2003). For example, the Supreme Court has held that the unenhanced maximum applies for defendants who did not receive notice under § 851(a)(1). *Id.* This outcome is indicative of the way that due process must be embraced. In the instant case, the Petitioner's due process rights would be cast aside if the safeguards of § 851 are disregarded. The procedural requirements for recidivist conviction and sentencing were not followed in Petitioner's case. Specifically, 21 U.S.C. § 844(a) requires the prosecutor to first establish the existence of a prior conviction, which must be final before the commission of the subsequent offense. Section 851(a)(1) then requires the prosecutor to file notice with the court before trial that the government is seeking a recidivist enhancement. The defendant, prior to sentencing, must be asked whether he affirms or denies the prior conviction. 21 U.S.C. § 851(b). The defendant must then be allowed to issue a written

denial of any allegation regarding the prior conviction. 21 U.S.C. § 851(c). If the defendant denies any of the allegations in the notice, then a hearing is held where the U.S. attorney has the burden of proving beyond a reasonable doubt any factual issue. 21 U.S.C. § 851(c)(1).

Because Petitioner was not provided with any such opportunity to challenge a recidivist charge before the state court, the Immigration Court, or any court for that matter, it is error to treat his conviction as a recidivist charge for immigration purposes. The Petitioner was never given notice prior to trial that the government was seeking a recidivist enhancement. He was never asked whether he affirmed or denied the prior conviction, nor was he given the opportunity to issue a written denial of any allegation regarding the prior conviction. The issue was never litigated by the parties nor determined by the court. Furthermore, in some cases the defendant is allowed to challenge the validity of the first conviction without the necessity of lodging a formal collateral challenge in the convicting state. 21 U.S.C. §§ 851(c)(2), (e); *U.S. v. Arnold*, 467 F.3d 880, 886-87 (5th Cir. 2006). This further solidifies the conclusion that treating Petitioner's misdemeanor possession convictions as an aggravated felony is a violation of due process.

3. Petitioner was not convicted under a state-law counterpart to the federal recidivist possession offense and, therefore, his second possession offense does not correspond to recidivist possession under § 844(a).

All that can be reasonably discerned from the footnote in which the Supreme Court addressed the recidivist possession statutory language is that 21 U.S.C. § 844(a) defines "recidivist possession" as "an offense," constituting a "felony violation" of the federal drug laws, that "corresponds" to some "state possession crimes." *In re Carachuri-Rosendo*, 24 I&N Dec. at 389; *Lopez*, 127 S.Ct. 630 n.6. The BIA has held that it is clear that a conviction arising in a state that has drug-specific recidivism laws cannot be deemed a state-law counterpart to "recidivist possession" unless the state actually used those laws to prosecute the person. *In re Carachuri-Rosendo*, 24 I&N Dec. at 389. Without a showing of recidivism within the confines of the state prosecution, the BIA concluded that the state offense cannot be said to proscribe conduct punishable as a felony under federal law. *Id.*

In Petitioner's case, neither of his offenses were charged and proven to be a recidivist possession offense. In fact, Petitioner's charging documents specifically allowed for the government to charge Petitioner with an enhancement. In addition, Petitioner's second possession offense does not "correspond to" recidivist possession under § 844(a). Simple

possession under state law is not punishable as a federal felony, and thus does not count for purposes of a recidivism charge. *Lopez*, 127 S.Ct. 625, 631 (2006). The state criminal court had the option to charge the Petitioner as a recidivist for his second offense but affirmatively elected not to proceed under its own available recidivism laws and simply charged him with a possession offense. No court is permitted to re-characterize the charge as a recidivist possession simply because Petitioner's record reflects two charges. The possession conviction is thus not a "state counterpart" to federal recidivist possession under the CSA and is not a drug trafficking aggravated felony.

The government in *In re Carachuri-Rosendo* initially argued that any correspondence between a state possession crime and the federal felony of recidivist possession could be established by means of a purely hypothetical inquiry, in which the question becomes whether the Petitioner has a criminal history that could have exposed him to felony treatment had he been prosecuted federally, as opposed to whether he was convicted of a state offense that proscribes conduct punishable as a felony under the CSA. *In re Carachuri-Rosendo*, 24 I&N Dec. at 390. However, the government then modified its position and conceded that a conviction of simple possession arising in a state that has drug-specific recidivism laws cannot be deemed a state-law counterpart to

"recidivist possession" unless the state actually used those laws to prosecute the person. *Id.* at 391.

As mentioned above, Petitioner was not convicted under the Texas recidivist statute, and his simple possession conviction, though subsequent, does not correspond to "recidivist possession" under the CSA. Unless the requirements for a felony conviction under 21 U.S.C. §§ 844(a) and 851 have been met, the maximum term of imprisonment authorized for a simple possession offense is no more than one year. The definition of an aggravated felony in both the Immigration and Nationality Act and the Controlled Substances Act turns explicitly on whether an offense is punishable by a maximum term of imprisonment of "more than one year" under 18 U.S.C. § 3559(a). *See* INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2). Since Petitioner's convictions under state law for simple drug possession are punishable as misdemeanors under the CSA, and since a federal felony conviction for recidivist possession pursuant to 21 U.S.C. §§ 844(a) and 851 requires notice, proof, as well as an opportunity to challenge the fact, finality, and validity of a prior conviction, a state possession offense where these procedural requirements were not met cannot then be converted into the equivalent of a federal recidivist possession felony for purposes of categorizing the Petitioner as an aggravated felon. Therefore, the decision of the Court of Appeals in this case was in error and should be overturned.

CONCLUSION

For the reasons shown, Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

RAED GONZALEZ
Counsel of Record for Petitioner
FOSTERQUAN, LLP
5177 Richmond Ave., Suite 800
Houston, Texas 77056
(713) 625-9225

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-60745

Summary Calendar

RICHARD LAWRENCE ALEXIS, also known as Richard Alexis, also known as Richard L Alexis

Petitioner

v.

ERIC H. HOLDER, JR., U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A43-155-894

(Filed Nov. 13, 2009)

Before REAVLEY, DAVIS, and HAYNES, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Richard Lawrence Alexis has filed a petition for review of the Board of Immigration Appeals's (BIA) order denying his appeal of the immigration judge's determination that he is ineligible for cancellation of removal due to his status as an aggravated felon. Alexis argues that neither of his state misdemeanor possession of marijuana convictions was a felony under the Controlled Substances Act (CSA), and that his recidivism was not punishable under the CSA as an aggravated felony. He further argues that a federal recidivist conviction requires procedural requirements which were not followed in his case, including an opportunity to challenge the recidivist charge.

Although 8 U.S.C. § 1252(a)(2)(C) generally bars judicial review of a removal order based on the alien's commission of an aggravated felony, this court retains jurisdiction to review constitutional claims or questions of law raised in a petition for review. *Carachuri-Rosendo v. Holder,* 570 F.3d 263, 265 (5th Cir. 2009), *petition for cert. filed,* 78 USLW 3058 (Jul. 15, 2009) (No. 09-60). Because Alexis argues that the BIA's decision was incorrect as a matter of law, this court has jurisdiction to review his claim. *See id.* Review is de nova. *Id.*

In *Carachuri-Rosendo,* 570 F.3d at 263, this court rejected the very arguments raised by Alexis under materially indistinguishable facts. In a letter submitted pursuant to FED. R. APP. P. 28(j), Alexis takes notice of the issuance of the mandate in *Carachuri-Rosendo* and he acknowledges that it "controls the

present matter." Given the foregoing, Alexis's petition is DENIED.

U.S. Department of Justice
Executive Office for
Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A43 155 894 – Houston, TX Date: JUL 25, 2008

In re: RICHARD LAWRENCE ALEXIS a.k.a. Richard Alexis a.k.a. Richard L. Alexis

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alexandre Afanassiev, Esquire

ON BEHALF OF DHS: James Edward Manning
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] – Convicted of controlled substance violation

APPLICATION: Cancellation of removal

The respondent has appealed from the Immigration Judge's March 27, 2008, decision pretermitting his application for cancellation of removal for certain permanent residents under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), because he failed to demonstrate that he has not been convicted of an aggravated felony as defined under section 101(a)(43)(B) of the Act (drug trafficking

crime as defined in 18 U.S.C. § 924(c)).[1] The Department of Homeland Security has requested that the Immigration Judge's decision be summarily affirmed. We affirm the Immigration Judge's decision, and dismiss the appeal.

The respondent has two relevant convictions in Texas, both for possessing 2 ounces or less of marijuana, in violation of the Texas Health & Safety Code, on May 14, 2002, and on June 10, 2005, respectively.[2] The Immigration Judge concluded that the respondent's 2005 conviction was an "aggravated felony" under section 101(a)(43)(B) of the Act, because it corresponded to the Federal felony of "recidivist possession" when considered in conjunction with a prior 2002 conviction for marijuana possession. The Immigration Judge found, and the respondent does not meaningfully dispute, that his 2002 conviction was "final," in that he did not at any time appeal this conviction. *See Smith v. Gonzales,* 468 F.3d 272 (5th Cir. 2006) (a judgment is final within the meaning of

---

[1] The respondent does not challenge the Immigration Judge's determination that he is removable under section 237(a)(2)(B)(i) of the Act (Br. at 1, 3, 12). Therefore, it is only the respondent's eligibility for relief from removal that is at issue on appeal before us.

[2] The respondent was also convicted on July 31, 2007, of possession of a prohibited substance in a correctional facility, in violation of Tex. Penal Code Ann. § 38.11. Although the Immigration Judge addressed the respondent's arguments as it relates to this conviction, the Immigration Judge did not find this conviction to be determinative in this case (I.J. at 2).

the Controlled Substances Act when it is no longer subject to examination on direct appeal, such as when the time for seeking discretionary review of the conviction has elapsed). The judgment in the record indicates that the respondent committed the offense underlying his 2005 conviction on or about May 20, 2005, which was well after the appeal period for his 2002 conviction has expired. *See* Tex. Rule App. Proc. 26.2 (listing time deadlines for perfecting appeal). Accordingly, because the respondent has a final conviction for a drug offense on the date that he committed the offense underlying his 2005 marijuana possession conviction, this latter conviction is "considered a felony under federal law," as was found in *U.S. v. Sanchez-Villalobos,* 412 F.3d 572 (5th Cir. 2005), and thereby qualified as an aggravated felony under section 101(a)(43)(B) of the Act. *See Matter of Carachuri-Rosendo,* 24 I&N Dec. 382 (BIA 2007). Notwithstanding the respondent's arguments to the contrary, we find here, as we did in *Carachuri-Rosendo, supra,* that under the law in the United States Court of Appeals for the Fifth Circuit, the respondent's second conviction need not have been entered in a proceeding that complied with the procedural requirements for Federal recidivist treatment in order for the underlying offense to be "considered a felony under federal law."

To the extent that the respondent has questioned the continuing validity of the Fifth Circuit's alternative holding in "Part B" of *U.S. v. Sanchez-Villalobos, supra,* where the court found sufficient proof to

establish a correspondence between a State possession offense and the Federal felony "recidivist possession," we have noted that this decision has not been foreclosed by *Lopez v. Gonzales*, 549 U.S. 47 (2006). *See Carachuri-Rosendo, supra.* More significantly, the Fifth Circuit has recently reaffirmed "Part B" of *U.S. v. Sanchez-Villalobos, supra*, in *U.S. v. Cepeda-Rios*, ___ F.3d ___, 2008 WL 2266996 (5th Cir. 2008), finding nothing in *Lopez v. Gonzales, supra,* that overruled this aspect of its decision. In *U.S. v. Cepeda-Rios, supra*, the Fifth Circuit held that the defendant's second conviction for possession could have been prosecuted as a Federal felony "recidivist possession," and thus, qualifies as an aggravated felony as defined in section 101(a)(43)(B) of the Act. *U.S. v. Cepeda-Rios, supra.* The Fifth Circuit stated that "although [Part B of *U.S. v. Sanchez-Villalobos, supra*] was an alternative holding, it is binding, nonetheless." *Id.* The Board, too, remains bound by the Fifth Circuit's analyses *in U.S. v. Sanchez-Villalobos, supra,* and *U.S. v. Cepeda-Rios, supra.* Accordingly, we must find in this case, that the respondent's second conviction for possession of marijuana constituted an aggravated felony as defined under section 101(a)(43)(B) of the Act, thus, rendering him ineligible for cancellation of removal under 240A(a) of the Act. *See Carachuri-Rosendo, supra.* The following order shall be entered.

ORDER: The respondent's appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Houston, Texas

File No.: A 43 155 894 March 27, 2008

In the Matter of	)	
RICHARD LAWRENCE ALEXIS,	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(2)(A)(iii) of the Act – convicted of an aggravated felony; Section 237(a)(2)(B)(i) of the Act – convicted of a controlled substance violation

APPLICATIONS: None

ON BEHALF OF RESPONDENT:	ON BEHALF OF DSH:
Janice Oviatt Houston	James Manning Assistant Chief Counsel Houston

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is 27 years old, a native and citizen of Trinidad and Tobago. He is in removal proceedings pursuant to the Notice to Appear dated November 21, 2007, found at Exhibit No. 1. On this document he is charged with being subject to removal as stated above. The aggravated felony definition is the one found at Section 101(a)(43)(B) of the Act, an

offense relating to illicit trafficking in a controlled substance.

In support of the charges, the Government alleges and respondent, with assistance of counsel, admits that he is not a citizen of the United States, that he was born in Trinidad and Tobago and is a citizen of that country; that he was admitted to the United States in Miami, Florida on or about July 16, 1991, as a lawful permanent resident; that he was on June 10, 2005, convicted in Montgomery County, Texas for the offense of criminal possession of a controlled substance, to wit, marijuana; and that he was on July 31, 2007, convicted in Waller County, Texas for a prohibited substance in a correctional facility. At Exhibit No. 1-A, we have the Form I-261, with an additional allegation no. 6, which reads, you were on July 31, 2007, convicted in the 155th District Court, Waller County, Texas for the offense of a prohibited substance in a correctional facility, to wit, Clonazapam. The Court found that based upon the evidence at Exhibit No. 6 that respondent was so convicted of that offense. The Court further found, contrary to the respondent's denial, that on May 14, 2002, he was convicted in Harris County, Texas for possession of cocaine. This finding is based upon the evidence at Exhibit No. 7.

The Court found the evidence to be clear and convincing that respondent has been convicted of a controlled substance violation as charged under Section 237(a)(2)(B)(i) of the Act. The Court further found that the respondent had been convicted of an

aggravated felony based upon the fact that respondent has two convictions for possession of marijuana, and the 2002 conviction was not appealed. The Court would note that the fact that he was convicted in 2007 of possession of a substance identified as Clonazapam is superfluous as it relates to whether or not the respondent was convicted of more than one controlled substance violation. However, respondent did object to the Court finding that he had been convicted of a controlled substance violation based upon the evidence at Exhibit No. 6. The respondent actually points out that the controlled substance identified on the information does not appear on the controlled substance list in that form. However, the Court notes that at 21 C.F.R. Section 1308.14 there is identified the controlled substance Clonazepam, which is the same controlled substance identified at Section 481.104 of the Health and Safety Code of the State of Texas, Penalty Group No. 3. The Court finds that the spelling of the controlled substance on the information is a typo. The Court finds that the respondent has been convicted of a controlled substance on three different occasions and there does not appear to have been an appeal for either of the first two convictions.

The respondent also takes issue with whether or not the Board of Immigration Appeals has correctly interpreted the Fifth Circuit law, particularly *United Stated v. Sanchez Villalobos,* 412 F.3d 572, when it ruled in *Matter of Carachuri-Rosendo,* 24 I&N Dec. 382, that under these facts this Court can find the

respondent have been convicted of an aggravated felony when it can be established through the evidence that he has a subsequent controlled substance violation after a prior controlled substance conviction became final. The Court finds that it is bound by the present decision of the Board, which has not been replaced or supplanted by decisions from a higher court, such as the Fifth Circuit of the U.S. Supreme Court. Because the respondent has the recidivist conviction for a controlled substance violation, he could have been sentenced to confinement for up to two years if under these facts he had been prosecuted in federal court. And, because of that, this Court finds that he has been convicted of an aggravated felony, making him ineligible for any form of relief that would be required in the exercise of discretion on the part of the Attorney General.

Respondent has not identified any other form of relief he will be seeking from the Court. And in the absence of applications for relief that are prosecutable before the Court, the Court issues the following order:

ORDER

IT IS HEREBY ORDERED that the respondent be removed from the United States to Trinidad and

Tobago on the charges sustained on the Notice to Appear at Exhibit No. 1.

JIMMIE LEE BENTON
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JIMMIE LEE BENTON, in the matter of:

RICHARD LAWRENCE ALEXIS

A 43 155 894

Houston, Texas

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Sandra L. Duncan/[illegible]
Sandra L. Duncan,
Transcriber

Free State Reporting, Inc.
1378 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

May 15, 2008
(Completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

IMMIGRATION COURT
5520 GREENS ROAD
HOUSTON, TX 77032

In the Matter of

Case No.: A43-155-894

ALEXIS, RICHARD LAWRENCE
Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 27 March 08

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to Trinidad and Tobago or in the alternative to .

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $___ with an alternate order of removal to .

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] A Waiver under Section ___ was ( ) granted ( ) denied ( ) withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ___ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ___ until ___.

[ ] As a condition of admission, respondent is to post a $___ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on. discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: Mar 27, 2008

/s/ J. L. Benton
JIMMIE LEE BENTON
Immigration Judge

Appeal: Waived/Reserved Appeal Due By:
28 April 08
by R

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
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DATE: 3/27/08 BY: COURT STAFF /s/ N Sanchez
Attachments: [ ] EOIR-33 [ ] EOIR-28
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21 U.S.C. § 844. Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable

under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both.

The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

(b) Repealed. Pub. L. 98-473, title II, § 219(a), Oct. 12, 1984, 98 Stat. 2027

(c) "Drug, narcotic, or chemical offense" defined

As used in this section, the term "drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this subchapter.

§ 851 Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased

punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior

conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person

shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

Supreme Court, U.S.

No. 09-955

In the Supreme Court of the United States

RICHARD LAWRENCE ALEXIS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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An alien who has been convicted of an aggravated felony is ineligible, *inter alia*, for the discretionary relief of cancellation of removal. 8 U.S.C. 1229b(a)(3). Under 8 U.S.C. 1101(a)(43)(B), an "aggravated felony" includes any "drug trafficking crime," which is defined in 18 U.S.C. 924(c)(2) to include any "felony punishable under the Controlled Substances Act." Under one provision in the Controlled Substances Act, 21 U.S.C. 844(a), a person who commits a drug possession offense after his conviction for a prior drug offense has become final may be punished as a felon.

Petitioner is an alien who was found to be removable from the United States and sought cancellation of removal. Pet. App. 9-12. Petitioner had been convicted of a state drug possession offense after a prior state drug possession conviction had become final. *Id.* at 5-6, 10-11; see Pet. 5, 14-15. The immigration judge determined

that petitioner's second drug possession offense qualifies as an "aggravated felony" that made him ineligible for cancellation of removal. Pet. App. 12. The Board of Immigration Appeals and the court of appeals upheld that determination. *Id.* at 2-3, 5-7.

Petitioner contends (Pet. 16-26) that his second drug possession offense does not qualify as "aggravated felony" because the state court did not sentence him as a recidivist, using procedures like those applicable in federal court, in the prosecution for his second drug possession offense. On December 14, 2009, this Court granted certiorari in *Carachuri-Rosendo* v. *Holder*, No. 09-60, to address whether a second or subsequent state offense of possession of a controlled substance automatically qualifies as an "aggravated felony" for purposes of 8 U.S.C. 1101(a)(43)(B), or instead qualifies only if the State actually applied a recidivist sentencing enhancement, using procedures like those applicable in federal court, in the prosecution for the second or subsequent offense. Because this petition presents the same question as *Carachuri-Rosendo*, it should be held pending this Court's resolution of *Carachuri-Rosendo*, and then disposed of as appropriate in light of the decision in that case.*

Respectfully submitted.

ELENA KAGAN
Solicitor General

APRIL 2010

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* The government waives any further response to the petition unless the Court requests otherwise.